No. 82-701

Supreme Court, U.S.
FILED
JAN 7 1983
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similiarly situated,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LINDA R. HIRSHMAN,
KALMAN D. RESNICK,
JACOBS, BURNS, SUGARMAN & ORLOVE,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

EARLE PUTNAM,
General Counsel,
Amalgamated Transit Union,
5025 Wisconsin Avenue, N.W.,
Washington, D.C. 20016.

Of Counsel:

Keenan Printing Company 312-648-0050 ◀ 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NEW CASTLE AREA TRANSIT AUTHORITY,

Petitioner,

v.

ROBERT M. KRAMER, LUTHER A. MILLER, DONALD PETTITT, HOWARD N. BARNES, DAVID R. SHAW, GERALD J. MAGGIE, ERNEST ORELLI, PHILLIPS C. REED, JAMES W. BURNS, G. MAXINE PARDICK, MARTHA E. KEITH, JAMES L. RAMSEY, CLYDE W. REED, RALPH L. JONES, PHILLIPS W. REED, JOHN P. CARSON, ROBERT C. BRUNSWICK, DAVID C. MATTHEWS, WALTER R. SLACK, WILLIAM L. HANNA, LOUIS V. PAGLIARO, and all other plaintiffs similiarly situated,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

Respondents Robert M. Kramer, et al., file this Supplemental Brief to call this Court's attention to the recent decision of the First District Court of Appeals for the State of Florida in *Francis* v. *City of Tallahassee*, —— So. 2d —— (1st Fla. Dist. Ct. App. Dec. 10, 1982), holding that bus drivers employed by the City of Tallahassee mass transit bus system are covered by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (hereinafter, "FLSA"). The ruling of the Court of Appeals is set forth in the Appendix at pp. A1-A5. In so holding, the Florida Court of Appeals reversed the ruling of the trial court, cited as authority by Petitioner. *Francis* v. *City of Tallahassee*, No. 79-446 (2nd Cir. Fla. 1980) (Pet. Br., at 16).

Applying the tests set forth by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *United Transportation Union* v. *Long Island Railroad*, 455 U.S. ——, 102 S. Ct. 1349, 71 L. Ed. 2d 547 (1982) (hereinafter, "*Transportation Union*"), the Florida Court of Appeals, citing *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308 (3rd Cir. 1982), unanimously rejected the City of Tallahassee's argument that the Tenth Amendment to the United States Constitution barred application of the FLSA to its municipal transit employees, holding instead that "local mass transit systems are within the purview of the FLSA." (App. A4)[1].

---

1. In its ruling, the Court of Appeals explicitly rejected the City's argument, made by Petitioner here as well (Pet. Br., at 13, n. 13), that this Court's ruling in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. ——, 102 S. Ct. 2202, 72 L. Ed. 2d 639 (1982) supports the City's position. (App., p. A5).

The Florida Court of Appeals decision is the second appellate court and third judicial ruling on the merits of this issue since this Court's decision in *Transportation Union, supra,* each of which has held the Tenth Amendment not to be a bar to application of the FLSA to publicly-owned mass transit systems. *Kramer* v. *New Castle Area Transit Authority, supra; Scholz* v. *LaCrosse,* No. 80-C-238 (W.D. Wisc. Sept. 1, 1982). *See,* Resp. Br., at 9. In view of the unanimity of the post-*Transportation Union* decisions on the question presented to this Court and in the absence of any conflict among United States Courts of Appeals, the petition for writ of certiorari should be denied.

Respectfully submitted,

Linda R. Hirshman,
Kalman D. Resnick,
Jacobs, Burns, Sugarman
& Orlove,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

Earle Putnam,
General Counsel,
Amalgamated Transit Union,
5025 Wisconsin Avenue, N.W.,
Washington, D.C. 20016.

Of Counsel:

IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA

WILLIAM FRANCIS, individually and on behalf of all others similarly situated, *Appellant*, vs. CITY OF TALLAHASSEE, *Appellee*.	Not Final Until Time Expires to File Rehearing Petition and Disposition Thereof if Filed. — Case No. AJ-104

Opinion filed December 10, 1982

An Appeal from the Circuit Court for Leon County. Charles A. Miner, Jr., Judge.

James O. Shelfer, of Gardner, Shelfer, Mendelson and Duggar, Tallahassee, for Appellant.

Bryan W. Henry, City Attorney and James R. English and Lewis E. Shelley, Assistant City Attorneys, of Henry, Buchanan, Mick & English, P.A., Tallahassee, for Appellee.

McCORD, J.

William Francis, individually and on behalf of all others similarly situated, appeals from the trial court's final summary judgment determining that bus drivers employed by the City of Tallahassee mass transit system (Taltran) are not covered by the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (FLSA). We reverse.

The relevant facts to this appeal are essentially undisputed. The plaintiffs seek damages from the City of Tallahassee and a ruling from the trial court to the effect that Taltran is subject to the minimum wage and maximum

hour provisions of the FLSA. Specifically, they seek overtime pay for hours worked in excess of 40 hours per week.

Prior to December 3, 1973, the local Tallahassee bus service was owned and operated by a private company, City Transit, Inc. At that time, its drivers had a right to overtime pay under the FLSA, as the City concedes. On that date, however, with the assistance of federal monies provided under the Urban Mass Transit Act (UMTA), 49 U.S.C. § 1601 *et seq.*, Tallahassee purchased the bus service. After purchasing the system Tallahassee retained the same drivers, and the function and duties of the system's personnel remained about the same. The federal government continues to subsidize Taltran to the extent of paying approximately 50% of the system's operating losses. The actual fare charged returns less than one-half of the actual cost of the operation. Further, for budgetary, personnel, and employee relations purposes, Taltran is treated much the same as other municipal departments, and its employees are subject to the same rules and regulations as other city employees. The trial court granted its final summary judgment in reliance upon *National League of Cities* v. *Usery* (*NLC*), 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465, (1976) and *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (6th Cir. 1979).

In *NLC*, the U.S. Supreme Court held that the 10th Amendment prevented the application of the overtime pay provisions of the FLSA to employees of states or their political subdivisions who are engaged in traditional government functions. *Id.* at 855, 49 L. Ed. 2d at 259-60, 96 S. Ct. at 2475. A nonexclusive list of such traditional functions included police protection, sanitation, public health, parks and recreation, hospitals, and schools. *NLC*, however, afforded little guidance as to the identification of such traditional governmental functions. Later, in *Ho-*

del v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), the court announced a three-pronged test for evaluating whether a commerce clause regulation, such as the FLSA, contravenes the 10th Amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "State as States." Second, the federal regulations must address matters that are indisputably "attribute[s] of state sovereignty." And third, it must be apparent that the State's compliance with the federal law would impair their ability "to structure integral operations in areas of traditonal governmental functions." (Citations omitted).

Id. at 287-8, 69 L. Ed. 2d at 23, 101 S. Ct. at 2365-6. The key prong to this test is the third one. *United Transportation Union* v. *Long Island Railroad Company* (*LIRR*), 455 U.S. ——, ——, 71 L. Ed. 2d 547, 553, 102 S. Ct. 1349 (1982). While noting that the determination of whether a federal law impairs a state's authority with respect to "areas of traditional functions" is difficult, the U.S. Supreme Court has observed:

> In essence, *National League of Cities* held that under most circumstances federal power to regulate commerce could not be exercised in such a manner as to undermine the role of the States in our federal system. This Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation. Rather, *it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to ham-*

> *per the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."*
>
> Just as the federal government cannot usurp traditional state functions, *there is no justification for a rule which would allow the State, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulations.* (Citations omitted; emphasis supplied).

LIRR, 455 U.S. at ——, 71 L. Ed. 2d at 554-5. Applying these tests, the Third Circuit Court of Appeals has concluded, and we agree, that the local mass transit systems are within the purview of the FLSA. *Kramer* v. *Newcastle Area Transit Authority,* 677 F. 2d 308 (3d Cir. 1982). That court noted that local mass transit systems have been historically owned and operated by private companies; that the federal government, through the UMTA, has demonstrated an active involvement in local mass transportation; and, that the move away from private transit systems into public transit systems was started and effected by the federal government which provided the financial support, through the UMTA, to allow the change-over. Further, it retains through its matching funds program an intimate involvement in such public systems. *Id.* at 309-10. Considering the pervasive influence of the federal government in this area, as well as Tallahassee's relatively recent entry into the field, one could hardly conclude that local mass transit is a "traditional function." Additionally, we find it difficult to understand how the imposition of overtime wages on the City of Tallahassee for these particular employees will impair or endanger the separate and independent existence of a state or its political subdivisions. *LIRR,* 455 U.S. at ——, 71 L. Ed. 2d at 554-5; *Kramer,* at 311 (Garth, concurring).

We find nothing in *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (6th Cir. 1979), which dictates a different conclusion. In *Amersbach*, the Sixth Circuit Court of Appeals determined that the operation of a municipal airport was an integral function of city government and thus immune from the minimum wage and maximum hour provisions of the FLSA. As that court observed, however, privately owned airports serving municipalities are virtually unknown, unlike mass transit systems which, for the most part, were until recently private entities. *Id.*, at 1038. Further, the City's reliance on *Jackson Transit Authority* v. *Amalgamated Transit Union, Local 1285*, —— U.S. ——, 72 L. Ed. 2d 639, 102 S. Ct. —— (1982) is misplaced, for there the issue was whether section 13(c) of the UMTA by itself permits a union to sue in federal court for violation of collective bargaining agreements. It contains no mention at all of the FLSA, and we decline to extend its rationale to this case.

The trial court relied upon the decision and opinion of the United States Circuit Court of Appeals, Second Circuit, in *United Transportation Union* v. *Long Island Railroad Co.*, 634 F. 2d 19 (2d Cir. 1980), which was reversed by the United States Supreme Court subsequent to the trial court's disposition of this case [*United Transportation Union* v. *Long Island Railroad Company*, 455 U.S. ——, 71 L. Ed 2d 547, 102 S. Ct. 1349 (1982)]. It should also be noted that the trial court had no opportunity to consider the Third Circuit's opinion in *Kramer* v. *Newcastle Area Transit Authority, supra*, as it was released after the trial court's disposition of this case.

Accordingly, for the reasons set forth above, this cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

BOOTH and WENTWORTH, JJ., CONCUR.